

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 December 2006

Case Nos. 2004-BLA-0059 and
2004-BLA-5464

In the Matter of:
D.T.,¹ Widow, and
D.T., Deceased Miner,
Claimants,

v.

BROWNIES CREEK COLLIERIES
c/o ACORDIA EMPLOYERS SERVICE,
Employer,

and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Ron Carson, Lay Representative
On behalf of Claimant

Carl Brashear, Esq.
On behalf of Employer

Neil A. Moreholt, Esq.
On behalf of Director

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

¹ The Department of Labor has directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant's family members in any document appearing on a Department of Labor web site starting prospectively on August 1, 2006, and to insert initials of such claimant/parties in the place of those proper names. This order only applies to cases arising under the Black Lung Benefits Act, the Longshore and Harbor Workers' Compensation Act, and FECA. In support of this policy change, DOL has directed submission of a proposed rule change to 20 C.F.R. § 725.477, proposing the omission of the requirement that decisions and orders of Administrative Law Judges contain the claimant/parties' initials only, to avoid unwanted publicity of those claimants on the web, and has installed software that prevents entry of the full names of claimant parties on final decisions and related orders. I strongly object to that policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank*, 915 F.2d 320 (11th Cir. 1992) and those collected at 27 Fed.

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, (“the Act”) and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.²

On December 12, 2003, these cases were referred to the Office of Administrative Law Judges by the Director, Office of Workers’ Compensation Programs, for a hearing. A formal hearing on these matters was conducted on April 18, 2006, in Harlan, Kentucky by the undersigned Administrative Law Judge. All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES

The issues in these cases are:

1. Whether the miner had pneumoconiosis;
2. Whether the miner’s pneumoconiosis arose out of coal mine employment;
3. Whether the miner was totally disabled;
4. Whether the miner’s disability was due to pneumoconiosis;
5. Whether the miner’s death was due to pneumoconiosis; and
6. Whether the evidence establishes a change in condition and/or that a mistake was made in the determination of any fact in the prior denial pursuant to 20 C.F.R. § 725.310.

(Tr. 8).³

Proc., L. Ed. § 62:102 (Thomson/West July 2005). Furthermore, I strongly object to the specific direction by the DOL that Administrative Law Judges have a “mind-set” to use the complainant/parties’ initials if the document will appear on the DOL’s web sit, for the reason, *inter alia*, that this is not a mere procedural change, but is a “substantive” procedural change, reflecting decades of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge’s decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial “mind-set” constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F.R. § 725.455(b), not merely that presently contained in 20 C.F.R. § 725.477 to state such party names.

² The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ In this Decision, “DX” refers to the Director’s Exhibits, “CX” refers to the Claimants’ Exhibit, “EX” refers to the Employer’s Exhibit, and “Tr.” refers to the official transcript of this proceeding.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The miner was born on December 3, 1938, and he died on April 15, 2001, at the age of 62. (DX 2). He had a high school education, and married his wife in 1958. (DX 1; Tr. 10). They remained married until the miner's death, and the widow has not remarried. (DX 2). She claims no dependents. (Tr. 11).

The Claimant widow testified that her husband worked at Brownies Creek Coal Collieries operating a dozer, loading trains, hauling coal, and performing other jobs around the mines. (Tr. 11). Most of his work was outside. She testified that after working, her husband was very dirty and his clothes were covered in coal dust. (Tr. 12). She could not use her washing machine to clean his clothing, and he usually took a bath before coming into the house. The miner last worked on July 25, 1984, when he was injured. (DX 1; Tr. 12). As he was hauling coal, the truck wrecked, and he was thrown, breaking his back. (Tr. 13).⁴

The widow testified that her husband got to the point that he could not mow the lawn himself but she could not recall if it was before or after 1984. (Tr. 13). After he retired, his health worsened; he had to be propped up at night to sleep and his breathing was "very bad." (Tr. 14). He treated with Drs. Rader, Morgan, Baker, and Michaelson for his lung problems. (Tr. 13). The miner saw Dr. Rader and Dr. Morgan as treating physicians on a monthly basis. (Tr. 14). He used inhalers and was on oxygen. (Tr. 15). Toward the end of his life, the miner could hardly walk through the house, and he could not perform any yard work. (Tr. 16). He was bedridden for about the last year of his life. The widow testified that her husband smoked but quit in the 1980's. (Tr. 17). She was not certain if he smoked for about twenty years as Dr. Morgan indicated in one of his reports. (Tr. 18).

Procedural History

The miner filed his claim for benefits on March 17, 1994. (DX 1). It was denied by the Department of Labor, Office of Workers' Compensation, on August 31, 1994, on the grounds that the miner had failed to establish any element of entitlement. (DX 17). The miner requested modification of the denial in a handwritten letter dated July 31, 1995. (DX 22). Administrative Law Judge Joseph E. Kane denied the modification in a Decision and Order dated August 31, 1999. (DX 96). Judge Kane found that the newly submitted evidence, when considered in conjunction with the prior evidence, failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. The miner filed a request for modification on August 15, 2000, which was denied by the District Director on November 21, 2000. The miner then filed another request for modification on March 29, 2001. (DX 101). It was denied by the

⁴ I note that the miner stated on his claim form of March 17, 1994 that he quit because of a heart attack. (DX 1).

District Director in a Proposed Decision and Order Denying Request for Modification, dated June 4, 2001. (DX 104). In the meanwhile, the miner died on April 15, 2001. The miner's representative timely requested a formal hearing before the Office of Administrative Law Judges. (DX 105).

The miner's widow filed her claim for benefits under the Act on January 16, 2002. (DX 2). The Director, Office of Worker's Compensation Programs ("OWCP"), issued a Proposed Decision and Order Award of Benefits on September 2, 2003 and September 17, 2003. (DX 29, 32). The Employer timely requested a formal hearing before the Office of Administrative Law Judges. (DX 34). Judge Kane issued an order August 8, 2002, remanding both claims to the District Director for consolidation.

Length of Coal Mine Employment

Judge Kane found that the miner had established at least thirteen years of coal mine employment. The employer does not contest this finding. I find that the determination of at least thirteen years is supported by the Social Security records, the miner's testimony, and the parties' stipulation.

MEDICAL EVIDENCE

The miner's case is not governed by the amended regulations. Therefore, his request for modification is not subject to the evidentiary limitations set forth in § 725.414. However, the widow's claim is subject to those limitations. Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under § 725.414(a)(2)(i) and (3)(i) or § 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of §§ 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under § 725.414. § 725.406(b).

Claimant completed a Black Lung Benefits Act Evidence Summary Form. (CX 1). She designated Dr. Baker's interpretation of the September 26, 2002 x-ray, (DX 23), and the medical reports of Dr. Baker dated April 1, 2003, and Dr. Rader dated May 8, 2003. (DX 23, 24). Claimant also designated the treatment records of Dr. Steven Morgan from February 15, 2001 to

May 15, 2001. (DX 8). This evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414 (a)(3). Therefore, I admit the evidence and will consider it in this claim.

Employer completed a revised Black Lung Benefits Act Evidence Summary Form pursuant to my order of July 13, 2006. Employer designated Dr. Baker's reading of the May 16, 1997 x-ray and Dr. Dahhan's reading of the July 17, 1997 x-ray. (DX 81, 84). Employer further designated Dr. Castle's report of May 13, 2003, Dr. Saha's biopsy report of October 10, 2000, and Dr. Naeye's May 17, 2003 report in rebuttal of the biopsy report. (DX 25, 8, 26). Finally, Employer designated the treatment notes of Drs. Morgan and Rader from April 2003. (DX 28, 27). Employer's evidence complies with the requisite quality standards of §§ 718.102-107 and the limitations of § 725.414 (a)(3). Therefore, I admit the evidence designated in Employer's summary. Listed below is the medical evidence designated by both parties for the widow's claim.

X-RAYS

Exhibit	Date of X-ray	Date of Reading	Physician / Credentials	Interpretation
DX 81	5/16/97	5/16/97	Baker/B ⁵	0/1
DX 84	7/17/97	7/17/97	Dahhan/B	Negative
DX 23	9/26/00	4/02/03	Baker/B	1/1

Biopsy Evidence

Dr. Siby Saha performed a lung biopsy on the miner on October 10, 2000. (DX 8). Dr. Evelyn O'Daniel-Pierce was the pathologist who examined the tissue. Her report includes both gross and microscopic descriptions. The microscopic examination showed poorly differentiated carcinoma. The tumor was composed of nests of malignant cells which had increased nuclear size and pink eosinophilic cytoplasm. She diagnosed metastatic poorly differentiated carcinoma.

Dr. Richard L. Naeye reviewed the pathology report and slides on behalf of the employer. His report, dated May 17, 2003, states that "clinically significant coal worker[s'] pneumoconiosis (CWP) is probably absent in the lungs of this man." He based his opinion on the absence of fibrosis or very tiny crystals of toxic free silica associated with the anthracotic pigmentation in the lymph nodes. The black pigment in the lymph nodes had no associated fibrous tissue. He further added that this absence made "it unlikely that he has the minimum tissue damage findings in his lungs that would qualify for the diagnosis of coal worker[s'] pneumoconiosis." Dr. Naeye cited several medical articles for the proposition that coal miners

⁵ A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.51) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

do not have an increased frequency of lung cancer when cigarette smoking is taken into consideration. Dr. Naeye is board-certified in anatomic and clinical pathology.

Medical Narrative Evidence and Treatment Records

Dr. Steven K. Morgan provided a letter dated February 15, 2001. (DX 8). He opined that the miner had a respiratory impairment due to pneumoconiosis based on his symptoms of shortness of breath, wheezing, coughing, spitting up mucus, and fatigue, low blood gas reports, and an x-ray. Dr. Morgan also took into account 16 years of coal mine employment. He treated the miner since 1985 and prescribed inhalers, a nebulizer, and oxygen. He explained that the miner was unable to take out the garbage without dyspnea, walk even short distances without becoming short of breath, or perform everyday activities without assistance. In a letter of May 15, 2001, Dr. Morgan opined that pneumoconiosis was a major contributing factor in the miner's death on April 15, 2001.

Dr. Morgan was deposed on April 18, 2003. (DX 28). He is board-certified in internal medicine. He treated the miner from the mid-1980's until the mid-1990's for his heart condition following a heart attack. He then treated him again after he was diagnosed with lung cancer in 2000 until his death. Dr. Morgan testified that the miner also had emphysema, asthma, and some pulmonary fibrosis consistent with CWP. He interpreted an x-ray as positive for CWP. He considered a smoking history of at least one pack of cigarettes a day for twenty or more years and felt that this was the most likely cause of the miner's emphysema and played a part in his asthma. Dr. Morgan opined that one of the risk factors for lung cancer is occupational exposure. He felt it "had an interplay with the lung cancer because he had an underlying lack of total lung function of which the cancer then impaired more of his lung function and hastened his demise." (DX 28 @ 10). He added, however, that the most likely cause of the cancer was smoking. He was unable to state with any degree of certainty that the miner would have lived any longer than he did had he not had CWP.

Dr. Glen R. Baker provided a letter dated April 2, 2003. (DX 23). He considered an x-ray (1/1), a coal mine employment history (16 years), a smoking history (1 ½ packs of cigarettes a day for 25 years before quitting in 1988), a medical history (acute myocardial infarction and stroke in 1988), a PFT (severe restrictive ventilatory defect), a CT scan of the chest (left lower lobe lung mass), and a biopsy report (carcinoma of the lung). Dr. Baker had diagnosed coal workers' pneumoconiosis, chronic bronchitis, lung cancer, diabetes mellitus, ischemic cardiomyopathy, and chronic anxiety. Dr. Baker stated that the miner ultimately died from lung cancer but felt that his earlier death and inability to do well with therapy for the cancer were due to his overall medical condition. He opined that CWP hastened the miner's death. He stated:

When anyone has obstructive airway disease or a restrictive ventilatory defect, a history of coal dust exposure and dies of a pulmonary death, I always felt his death was hastened by the presence of pneumoconiosis. His coal dust exposure did not cause the lung cancer but resulted in his lungs being weaker than they would have been had he not had coal dust exposure and subsequent Coal Workers' Pneumoconiosis. On this basis, I thought his coal dust exposure, while

it did not cause his death, was contributory to his earlier demise and expected from his other medical conditions.

Dr. Emanuel Rader was deposed on April 24, 2003. (DX 27). He testified that he is a family practitioner who first treated the miner in 1996 and continued to treat him until April 17, 2000. He followed the miner for chronic obstructive pulmonary disease, arthritis, arteriosclerotic cardiovascular disease, hypertension, and diabetes mellitus. The miner was not diagnosed with lung cancer until after the last time Dr. Rader examined him. Dr. Rader considered a nonspecific smoking history of having smoked earlier in life but quitting a long time ago. He deposed that anything that makes a lung less than normal must be considered significant regardless of etiology. Dr. Rader reviewed x-rays he had read in 1994 and 1997. He found mild emphysema on the former and agreed with Dr. Baker's reading of the latter. Because the miner had not been smoking for nine or ten years prior to 1994, but his condition worsened, Dr. Rader did not associate the emphysema with smoking. Dr. Rader suggested that the miner transfer his care to Dr. Morgan, who did, in fact, later treat him.

Dr. Rader provided a letter dated May 8, 2003. (DX 24). His letter was written after his deposition and was an attempt to make a short statement of his impressions. He opined that the miner had pneumoconiosis that severely restricted his activity. Dr. Rader expressed that the miner was totally and permanently disabled due to his pneumoconiosis. He added that the disease did not cause his lung cancer but Dr. Rader felt the CWP "was a major contributing factor" in the miner's death. In fact, he felt that the miner would have died from his CWP if he had not died from lung cancer.

Dr. James Castle provided a report based on a review of medical records on May 13, 2003. (DX 25). He is board-certified in internal medicine and pulmonary disease. He reviewed Dr. Morgan's letters, the pathology report, and Dr. Rader's medical reports, letters, and deposition. He found the objective evidence insufficient to indicate the presence of CWP. He considered a 24 pack-year smoking history that ended in 1982 and thirteen years of coal mine employment. He pointed out that the miner's known cardiac disease and obesity could account for shortness of breath and other pulmonary symptoms. Dr. Castle opined that the miner did not demonstrate consistent physical findings of interstitial pulmonary disease such as rales, crackles, or crepitations. He saw only radiographic evidence that was entirely negative for pneumoconiosis. The October 1994 PFT was invalid but still showed results above disability levels, and the ABG was normal. Dr. Castle further opined that the miner died as a result of squamous cell carcinoma of the lung which was related to his tobacco smoking and was not hastened by, caused by, or contributed to by CWP.

Smoking History

Claimant testified only that her husband smoked but quit in the 1980's. Dr. Rader relied upon a smoking history of 24 years before quitting in 1982. Dr. Morgan relied on a smoking history of at least twenty years, and Dr. Baker reported a history of smoking one and one-half packs of cigarettes a day for 25 years before quitting in 1988. I find that the miner smoked between one and one and a half packs of cigarettes a day for at least 20 years before quitting some time in the 1980's.

DISCUSSION AND APPLICABLE LAW

The miner's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

1. Is a miner as defined in this section; and
2. Has met the requirements for entitlement to benefits by establishing that he:
 - (i) Has pneumoconiosis (see § 718.202), and
 - (ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and
 - (iii) Is totally disabled (see § 718.204(c)), and
 - (iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and
3. Has filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Miner's Request for Modification

Modification

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. § 932(a) and as implemented by § 725.310, provides that upon a miner's own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or a denial of benefits. § 725.310(a).

In deciding whether a mistake in fact has occurred, the United States Supreme Court stated that the Administrative Law Judge has "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Furthermore, the Sixth Circuit Court of Appeals, under whose appellate jurisdiction this case arises, stated that a modification request need not specify any factual error or change in conditions. *Consolidation Coal Co. v. Director, OWCP [Worrell]*, 27 F.3d 227 (6th Cir. 1994). Rather, Claimant may merely allege that the ultimate fact, total disability from pneumoconiosis arising out of coal mine employment, was incorrectly decided. *Id.* Additionally, the court stated that the Administrative Law Judge has the duty to reconsider all the evidence for a mistake of fact or a change in conditions. *Id.*

In determining whether a change in conditions has occurred requiring modification of the prior denial, the Benefits Review Board (“Board”) similarly stated:

The Administrative Law Judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *See also Napier v. Director, OWCP*, 17 B.L.R. 1-111 (1993); *Nataloni v. Director, OWCP*, 17 B.L.R. 1-82 (1993). Furthermore, if the newly submitted evidence is sufficient to establish modification . . . , the Administrative Law Judge must consider all of the evidence of record to determine whether Claimant has established entitlement to benefits on the merits of the claim. *Kovac v. BNCR Mining Corp.*, 14 B.L.R. 1-156 (1990), *modified on recon.*, 16 B.L.R. 1-71 (1992).

In the August 31, 1999 decision, Judge Kane found that the newly submitted evidence, when considered in conjunction with the prior evidence, failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. The miner filed a request for modification on August 15, 2000, which was denied by the District Director on November 21, 2000. The miner then filed another request for modification on March 29, 2001. (DX 101). It was denied by the District Director in a Proposed Decision and Order Denying Request for Modification, dated June 4, 2001. (DX 104). In accordance with the above precedent, I will review the newly submitted evidence, in conjunction with the evidence that was before Judge Kane and the District Director, to determine whether such evidence establishes any element of entitlement. In addition, the entire record will be reviewed to determine whether a mistake in the determination of a fact occurred in the denial of August 31, 1999.

The medical evidence submitted prior to and in conjunction with the request for modification decided by Judge Kane is sufficiently set forth in that Decision and Order and will not be repeated here. It is hereby incorporated by reference as if fully set forth herein. The medical evidence submitted by the miner in connection with the requests for modification that followed the denial issued by Judge Kane has not been set forth. Therefore, I will summarize it below.

X-RAYS

Exhibit	Date of X-ray	Date of Reading	Physician / Credentials	Interpretation
DX 1	2/24/99	2/24/99	Smiddy	Five-lobe micronodular change consistent with CWP
DX 1	2/17/00	2/17/00	Ramakrishnan/B, BCR ⁶	0/0

⁶ A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians

PULMONARY FUNCTION STUDY

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height	FEV₁	FVC	MVV	FEV₁/ FVC	Qualifying Results
Dx 1 2/17/00	Good/ Good/ Yes	61/ 74"	2.19 2.20*	3.27 3.31*	-- --	66% 66%	No No

*post-bronchodilator

This study was found unacceptable by Dr. N.K. Burki because of an insufficient number of FVC, FEV₁ or MVV's. Dr. Burki is board-certified in internal medicine and pulmonary disease.

ARTERIAL BLOOD GAS STUDY

Exhibit	Date	pCO₂*	pO₂*	Qualifying
Dx 1	2/17/00	35.1	68.7	No

Death Certificate

The miner died on April 15, 2001. (DX 1). The death certificate lists adenocarcinoma of the left lung with metastasis as the immediate cause of death. Coal workers' pneumoconiosis by clinical history was listed as another significant condition that contributed to death but did not result in the underlying cause of death. It is signed by a coroner who is not a physician.

Narrative Medical Reports

Dr. Joseph F. Smiddy, who is board-certified in internal medicine, examined the miner on February 24, 1999. He considered an individual medical history (emphysema and pneumoconiosis), family medical history (stroke, diabetes, heart disease, cancer, high blood pressure, and COPD), smoking history (formerly smoked but quit in 1986), coal mine employment history (13-14 years with heavy coal dust exposure), physical examination (clear chest), symptomatology (chronic shortness of breath, backache, and neck problems), and an x-ray (CWP). He diagnosed chronic bronchitis, pneumoconiosis, chest wall pain and a possible element of COPD.

Dr. Smiddy examined the miner again on February 17, 2000. (DX 1). Physical examination showed clear lungs with decreased breath sounds. Dr. Smiddy also considered a smoking history, coal mine employment history, symptoms, medical history, an x-ray (old

are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

granulomatous calcifications), a PFT (severe impairment), and an ABG. He diagnosed “clinical complex consistent with significant pneumoconiosis with underlying bronchitis and underlying chronic lung disease.”

Dr. Emanuel H. Rader provided a letter dated December 17, 1999. (DX 1). He last saw the miner on November 20, 1999, and at that time he had markedly symptomatic lungs and was suffering from bronchitis. He felt the miner’s condition was slowly worsening with his COPD. He opined that the miner was disabled for gainful employment based on his lungs.

Dr. Glen Baker provided a letter dated December 19, 2000. (DX 1). He stated that the miner had obstructive airway disease and a long history of coal dust exposure. Dr. Baker referenced an x-ray suggestive of black lung. He stated that the miner’s lung cancer caused respiratory difficulty. Dr. Baker added, however, that the miner’s severe respiratory impairment was due in part to his underlying obstructive airway disease with associated CWP, and he based this on the x-ray changes. At the time of the letter, Dr. Baker had been treating the miner for six to nine months and asserted that his daily activities were limited by his breathing impairment.

Dr. Russell M. Eldridge provided a letter dated December 20, 2000. (DX 1). He stated that the miner was in his care for lung cancer and had significant respiratory symptoms. He was not certain how much the miner’s occupational coal dust exposure contributed to his respiratory symptoms since the cancer was relatively advanced when Dr. Eldridge saw him, and the miner was a post-operative patient. He added that the miner had a significant amount of uninvolved lung, and he would have expected the miner to have less dyspnea than he exhibited if that lung were normal.

Dr. Siby P. Saha provided a letter dated December 20, 2000. (DX 1). He stated that he saw the miner on September 9, 2000, upon referral, and relied upon a coal mine dust exposure history of 16 years. Dr. Saha performed a left thoracotomy and multiple biopsies of the left lower lobe mass on October 10, 2000, and they disclosed poorly differentiated malignancy. He gave the miner a poor prognosis because of multiple problems including coronary artery disease, cerebrovascular disease, diabetes, and hypertension. In Dr. Saha’s opinion, the miner’s overall breathing condition had been severely impaired.

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

Pneumoconiosis is defined by the regulations:

(a) For the purpose of the Act, “pneumoconiosis” means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or “clinical” pneumoconiosis and statutory, or “legal” pneumoconiosis.

(1) *Clinical Pneumoconiosis*. “Clinical pneumoconiosis” consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers’ pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

(2) *Legal Pneumoconiosis*. “Legal pneumoconiosis” includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

(b) For the purposes of this section, a disease “arising out of coal mine employment” includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, “pneumoconiosis” is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

Sections 718.201(a-c).

(1) Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis. Under § 718.202(a)(1), one method for finding that pneumoconiosis exists is the use of x-ray evidence.

Judge Kane considered 79 x-ray readings from January 27, 1976 to July 17, 1997. Of these readings, not one was read as positive for pneumoconiosis. Therefore, I find no error in his determination that the x-ray evidence failed to establish the existence of pneumoconiosis.

There are three readings of three separate x-rays since Judge Kane’s decision. The February 24, 1999 x-ray was read by Dr. Smiddy as showing changes consistent with coal workers’ pneumoconiosis. A February 17, 2000 x-ray was found negative by Dr. Ramakrishnan. A September 26, 2000 x-ray was found positive by Dr. Baker. Thus, of the three most recent readings, two were found positive. However, Dr. Smiddy possesses no particular qualifications for x-ray interpretation. Dr. Ramakrishnan is both a B-reader and a board-certified radiologist. Dr. Baker is a B-reader. I place the most weight on Dr. Ramakrishnan’s reading based on his superior credentials. *Scheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). Accordingly, I find that the newly submitted x-ray evidence, when considered together with the prior x-ray readings, fails to establish the existence of pneumoconiosis pursuant to § 718.202(a)(1).

(2) Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based on biopsy or autopsy evidence. Dr. Saha performed a biopsy and Dr. O'Daniel-Pierce provided the pathology report. There was no mention of pneumoconiosis in the report. Dr. Naeye reviewed the biopsy slides and found that the miner probably did not have pneumoconiosis. He specified that there was an absence of tiny crystals of toxic-free silica associated with the anthracotic pigmentation. Based on Dr. Naeye's reasoning and his credentials as a pathologist, compounded with the lack of a diagnosis by Dr. O'Daniel-Pierce, I find that the biopsy evidence fails to establish the existence of pneumoconiosis.

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis; § 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under § 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

This section requires a weighing of all relevant medical evidence to ascertain whether or not Claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985).

Judge Kane found that the medical opinion evidence did not establish the existence of pneumoconiosis. He considered numerous opinions, including those from Drs. Woolum, Morgan, Wayne, Michelson, Baker, Rader, Dahhan, Broudy, Fino, and Castle. I have reviewed these medical opinions and agree with Judge Kane's determination. Thus, I find no mistake of fact on his part regarding this issue.

The opinions that have been submitted since Judge Kane's denial come from Drs. Morgan, Baker, Rader, Castle, Smiddy, Eldridge, and Saha. Of them, Drs. Morgan, Baker, Rader, and Smiddy diagnosed pneumoconiosis. Dr. Castle opined that the miner did not have the

disease. Drs. Eldridge and Saha did not specifically address the presence or absence of pneumoconiosis.

Dr. Morgan based his opinion in part on an x-ray that he stated he interpreted as positive for CWP and the finding of some pulmonary fibrosis consistent with CWP. In reviewing the record, I find that Dr. Morgan interpreted six separate x-rays between January 21, 1993 and January 17, 1995. He found the first suggested mild atelectasis, the next three showed COPD, the fifth revealed no active disease, and the most recent x-ray was negative. Accordingly, I find that these readings do not support Dr. Morgan's statement that he read an x-ray as positive for CWP. Furthermore, at his deposition, Dr. Morgan alluded to a smoking history of twenty or more years, whereas his records from 1985 through 1995 that were considered by Judge Kane referenced a 50-pack-year tobacco habit. This discrepancy calls into question the reliability of his report. Finally, Dr. Morgan did not explain his finding of pulmonary fibrosis. For these reasons, I do not consider Dr. Morgan's report well documented or reasoned, and I accord it little weight. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1291 (1984).

Dr. Baker's opinion is well documented and reasoned, although I note that his x-ray reading is at odds with Dr. Ramakrishnan's. Dr. Baker diagnosed a restrictive ventilatory defect and COPD with chronic bronchitis based upon his physical observations. The record does not include the CT scan on which he relied and he does not explain the discrepancy between the biopsy report which does not support a finding of CWP and his conclusion. Further, while Dr. Baker diagnoses the restrictive ventilatory defect and COPD based upon coal dust exposure, he does not account for how twenty-five pack years may have contributed to the Miner's condition. Accordingly, I only place some weight on his opinion.

Dr. Rader's opinion is based upon readings of x-rays from 1994 and 1997. In the former, he found emphysema. He stated that he agreed with Dr. Baker's reading of the latter. Dr. Baker read that film as category 0/1, a negative reading. Dr. Rader also did not specify any smoking history, but only noted "some smoking." Despite the fact that he treated the miner for about four years, up until the miner's cancer diagnosis, I find that Dr. Rader's opinion is not well reasoned on the basis he did not consider an accurate history of smoking. See *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). I therefore accord his opinion little weight.

Dr. Smiddy's opinion also lacks a specific smoking history. His physical examinations revealed no pulmonary abnormalities, but he still diagnosed chronic bronchitis, COPD, and CWP. The miner's symptoms of chronic shortness of breath were explainable, according to Dr. Castle, by his obesity and cardiac disease. Further, Dr. Smiddy does not consider how his smoking history (even though it is not clear how much of a history Dr. Smiddy considered) could affect the miner's pulmonary diagnoses. While Dr. Smiddy read the February 24, 1999 x-ray as positive for pneumoconiosis, the February 17, 2000 x-ray, on which he also relied, was found negative by Dr. Ramakrishnan. Dr. Smiddy, however, stated that the second x-ray showed old granulomatous calcifications. Dr. Smiddy diagnosis of CWP is not supported by the later x-ray. For these reasons, I find that Dr. Smiddy's opinion is entitled to less weight.

I find Dr. Castle's opinion well documented and reasoned. He alone pointed out two other risk factors, along with a correct smoking history, for pulmonary symptoms that the miner had: obesity and cardiac disease. His opinion is also supported by the history of physical findings and the overall x-ray evidence.

For the foregoing reasons, I find Dr. Castle's opinion to be the best reasoned and, therefore, entitled to the greatest weight. Because Dr. Castle's opinion is consistent with Judge Kane's earlier finding, I conclude that the evidence does not establish the existence of pneumoconiosis under § 718.202(a)(4).

Upon consideration of all the evidence under § 718.202(a), I find that the x-ray evidence, the biopsy evidence, and the medical opinion evidence together fail to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to § 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211 (4th Cir. 2000).

Arising out of Coal Mine Employment

In order to be eligible for benefits under the Act, Claimant must prove that pneumoconiosis arose, at least in part, out of the miner's coal mine employment. § 718.203(a). As I have found that the miner established at least 13 years of coal mine employment, he would be entitled to the rebuttable presumption set forth in § 718.203(b) that his pneumoconiosis arose out of coal mine employment. However, because the existence of pneumoconiosis has not been established, this issue is moot.

Total Disability

The miner may demonstrate that he was totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(c) or the irrebuttable presumption referred to in § 718.204(c). The Board has held that under § 718.204(c), all relevant probative evidence, both like and unlike must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

There is no evidence that Claimant established that he suffered from complicated pneumoconiosis. Therefore, the irrebuttable presumption of § 718.304 does not apply.

Total disability can be shown under § 718.204(c)(1) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. Judge Kane considered nine pulmonary function studies between April 14, 1994 and February 23, 1999. He found that seven of them were invalid and that the only two valid studies did not produce qualifying values. I find no error in Judge Kane's determination.

There is one additional PFT submitted in conjunction with the request for modification. It did not yield qualifying values either before or after the administration of a bronchodilator. In addition, the study was invalidated by Dr. Burki for a lack of a sufficient number of maneuvers. Because this study is both non-qualifying and invalid, I find that consideration of all the PFT's of record establishes that the miner failed to establish total disability pursuant to § 718.204(c)(1).

Total disability can be demonstrated under § 718.204(c)(2) if the results of arterial blood gas studies meet the requirements listed in the tables found at Appendix C to Part 718. Judge Kane considered six blood gas studies and found the majority of them nonqualifying. I have reviewed these studies and find no mistake in Judge Kane's determination. There is one additional ABG submitted since Judge Kane's denial. It did not produce qualifying values. When I consider this non-qualifying study together with the eight previous ABG's, I find that the blood gas studies fail to establish the existence of total disability under subsection (c)(2).

Total disability may also be shown under § 718.204(c)(3) if the medical evidence indicates that the miner suffered from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that the miner suffered from cor pulmonale with right-sided congestive heart failure. Therefore, I find that the evidence fails to establish the existence of total disability under subsection (c)(3).

Section 718.204(c)(4) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevented the miner from engaging in his usual coal mine employment or comparable gainful employment.

The exertional requirements of the miner's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to § 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. § 718.204(a); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986). The miner's last coal mining job was as a drill and dozer operator, which, according to his own testimony, did not require much heavy lifting.⁷

Judge Kane considered the opinions of Drs. Dahhan, Broudy, Fino, Castle, Rader, and Baker. He credited the opinions of Drs. Dahhan, Broudy, Fino, and Castle – that the miner was not totally disabled – over those of Drs. Rader and Baker to the contrary. I have reviewed those opinions and agree with Judge Kane's determination. Therefore, I find no mistake of fact on this issue.

⁷ I take judicial notice that the drill operator's job in coal mining does require heavy lifting of at least the drill itself.

Since the denial by Judge Kane, Dr. Rader opined that the miner was totally disabled for gainful employment based on his lungs. Dr. Baker asserted that the miner's daily activities were limited by his breathing impairment but he did not specifically opine that he was totally disabled. Dr. Saha stated that the miner's overall breathing condition had been severely impaired but did not specify that he was totally disabled by it. No other physicians provided opinions on this issue.

I do not find that Dr. Rader's latest opinion is entitled to any more weight than his earlier opinion. He did not express any knowledge of the exertional requirements of the miner's last coal mining job. He did not address the possibility of obesity and coronary disease as causes of the miner's pulmonary condition. In fact, his very assumption of the existence of CWP is belied by the objective evidence of record. Accordingly, I discount his opinion and find that the evidence does not establish the existence of total disability pursuant to § 718.204(c)(4). As a corollary, I find that the miner has failed to show a change in condition since Judge Kane's denial of benefits, and this claim must fail.

Widow's Claim

The widow's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, she must establish, by a preponderance of the evidence, that that her husband:

1. Was a miner as defined in this section; and
2. Met the requirements for entitlement to benefits by establishing that he:
 - (i) Had pneumoconiosis (see § 718.202), and
 - (ii) The pneumoconiosis arose out of coal mine employment (see § 718.203), and
 - (iii) Was the cause of his death (see § 718.205),
3. Has filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.205.

Death Due to Pneumoconiosis:

Claimant filed her claim on January 16, 2002. (DX 2). Therefore, entitlement to benefits must be established under the regulatory criteria at Part 718. *See Neeley v. Director, OWCP*, 11 B.L.R. 1-85 (1988). Section 718.205 provides that benefits are available to eligible survivors of a miner whose death was due to pneumoconiosis. An eligible survivor will be entitled to benefits if any of the following criteria are met:

Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death; or

Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where death was caused by complications of pneumoconiosis; or

Where the presumption set forth in § 718.304 (evidence of complicated pneumoconiosis) is applicable.

§ 718.205(c).

In order to be eligible for benefits, widow must prove that miner's death was caused by pneumoconiosis. Although the Benefits Review Board requires that death must be "significantly" related to or aggravated by pneumoconiosis, the circuit courts have developed the "hastening death" standard which requires establishment of a lesser causal nexus between pneumoconiosis and the miner's death. The Sixth Circuit reaffirmed its holding in *Brown v. Rock Creek Mining Corp.*, 996 F.2d 812 (6th Cir. 1993) (J. Batchelder dissenting), to state that benefits are awarded to a survivor who establishes that "pneumoconiosis is a substantially contributing cause or factor leading to the miner's death if it serves to hasten that death in any way." *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995). The new regulations also adopt this definition. § 718.203(c)(5). In order to recover benefits, widow must prove through medical opinion evidence that pneumoconiosis hastened her husband's death in some manner.

Because my finding above included all the evidence submitted in conjunction with the survivor's claim, I find that she has failed to establish the existence of pneumoconiosis. As a result, she cannot prove that pneumoconiosis hastened the miner's death. Nonetheless, I will address the evidence relevant to that issue.

The death certificate lists adenocarcinoma of the left lung as the immediate cause of death. Coal workers' pneumoconiosis was also listed as a significant condition that contributed to death. However, the death certificate is not signed by a physician and there is no indication that the coroner who signed the death certificate had any prior knowledge of the miner's condition. Therefore, I place no weight on the death certificate. *Smith v. Camco Mining, Inc.*, 13 B.L.R. 1-17 (1989).

Drs. Morgan, Baker, and Rader opined that CWP hastened the miner's death. Dr. Castle asserted that CWP did not hasten or contribute to the miner's death, which was the result of squamous cell carcinoma of the lung due to smoking.

I have already discounted Dr. Morgan's opinion that the miner had CWP. He did not explain his statement that occupational exposure, to coal dust in particular, is a risk factor for lung cancer. In fact, Dr. Naeye cited medical articles for the proposition that there is no increase in lung cancer among coal miners who do not smoke. Furthermore, Dr. Morgan's assertion that the miner had a lack of total lung function, presumably due to the CWP, and that it hastened his death when the lung cancer impaired more of that lung function is not supported by the PFT

evidence of record. Finally, Dr. Morgan was unable to opine that the miner would have lived any longer than he did if he had not had pneumoconiosis. For these reasons, I place less weight on Dr. Morgan's opinion.

I discount Dr. Baker's opinion for similar reasons. He stated that he "always" feels that death is hastened by CWP when a person has a ventilatory defect and coal dust exposure and dies a pulmonary death. This broad-based assumption is not tailored to the miner's case. Dr. Baker also worked on the assumption that the miner's "overall medical condition" that prevented him from doing well with his cancer therapy was due to CWP. In fact, the overwhelming objective medical data does not support a finding of CWP or legal pneumoconiosis, and the valid PFT's and ABG's did not demonstrate pulmonary disability.

Dr. Rader did not provide any explanation for his opinion that pneumoconiosis was a major contributing factor in the miner's death or that the miner would have died from the pneumoconiosis if he had not died from lung cancer. The overwhelming x-ray evidence was negative, and the only positive reading that was stated in terms of the I.L.O. classification scheme was category 1 pneumoconiosis. Further, the medical evidence in this case does not establish legal pneumoconiosis. Accordingly, I accord Dr. Rader's opinion with little weight.

Dr. Castle's opinion, on the other hand, is supported by the x-ray evidence, the pulmonary function studies, and the blood gas study evidence, as well as the miner's medical history and the course that his cancer took. Moreover, Dr. Castle's credentials lend more credence to his opinion. *Scott v. Director, OWCP*, 14 B.L.R. 1-38 (1990). I, therefore, place more weight on his opinion. Consequently, I find that Claimant has not established that her husband's death was hastened or caused by pneumoconiosis.

Entitlement

The miner failed to establish a change of condition or mistake of fact since the denial of his previous request for modification. The widow has failed to establish the existence of pneumoconiosis and that the miner's death was a result of pneumoconiosis. Therefore, I find that neither claimant is entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimants are found to be entitled to benefits under the Act. Because benefits are not awarded in these cases, the Act prohibits the charging of any fee to the Claimants for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claims of D.T. and D.T. for benefits under the Act are hereby DENIED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).